MORGAN, LEWIS & BOCKIUS LLP
Charles J. Malaret, Bar No. 144001
charles.malaret@morganlewis.com
Kathryn T. McGuigan, Bar No. 232112
kathryn.mcguigan@morganlewis.com
Emily L. Calmeyer, Bar No. 307432
emily.calmeyer@morganlewis.com
300 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90071-3132
Tel: +1.213.612.2500
Fax: +1.213.612.2501

Attorneys for Defendants,
RAYMOND FU and SHISEIDO AMERICAS CORPORATION (f/k/a GIARAN, INC.)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VASO GOUNTOUMAS, an individual,

Plaintiff,

vs.

GIARAN, INC., a Delaware corporation; RAYMOND FU, an individual, and DOES 1-10, inclusive,

Defendants.

Case No. 2:18-CV-07720-JFW-PJW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO DISMISS, OR IN THE ALTERNATIVE STAY ACTION

[Notice of Motion and Motion; Declarations of Charles J. Malaret and Yun "Raymond" Fu In Support Thereof; and [Proposed] Order filed concurrently herewith]

Honorable John F. Walter
Place: Courtroom 7A
United States Courthouse
350 W. 1st Street
Los Angeles, CA 90012

Date: November 19, 2018
Time: 1:30 p.m.

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I. INTRODUCTION

Plaintiff Vaso Gountoumas ("Plaintiff") improperly brought this lawsuit in violation of the valid and enforceable mutual arbitration provision ("arbitration provision") contained in the consulting agreement for business development and marketing services she had with defendants Giaran, Inc. ("Giaran")[1] and Yun "Raymond" Fu ("Raymond Fu") (collectively, "Defendants"). The arbitration provision expressly covers disputes "arising out of or relating to" the consulting agreement, requires arbitration to be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA Rules"), and requires the arbitration to take place in Suffolk County, Massachusetts.

The arbitration provision in the consulting agreement also provides, through the AAA Rules, that an arbitrator, and not a court, exclusively decides all issues relating to the existence, scope, or validity of the arbitration provision.

Accordingly, Defendants respectfully request the Court for an order compelling arbitration of the claims alleged by Plaintiff in her complaint, dismissing this judicial proceeding, or alternatively, staying Plaintiff's action during the pendency of arbitration.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff Expressly Agreed To Arbitrate "Any Controversy Or Claim" Arising Out Of Or Relating To Her Services For Giaran.

Plaintiff entered into a consulting agreement ("Agreement") effective February 1, 2017, to perform certain services for Giaran. Declaration of Yun "Raymond" Fu ("Fu Decl.") ¶ 8. The Agreement Plaintiff signed covered Plaintiff's services relating to "Marketing, Business Development, Team Setup,

[1] Giaran was acquired by Shiseido Americas Corporation in November 2017 and was consolidated into the company. Accordingly, Defendants filed its response to the complaint as Shiseido Americas Corporation, formerly known as Giaran, Inc.

[and] Management" for Giaran. *Id.*, ¶ 8, Ex. 2 at Ex. A. Plaintiff alleges that she performed work consistent with the Agreement. Dkt 5-1, ¶¶ 11-14, 20, 21. Giaran alleges that all of Plaintiff's work performed for Giaran was pursuant to and related to the Agreement. Fu Decl. ¶ 8.

Under the Agreement, Plaintiff expressly agreed to arbitrate any controversies or claims arising out of or related to her work for Giaran. Paragraph 9 of the Agreement titled, "Arbitration" clearly states:

> ***Any controversy or claim*** (except those regarding Inventions, Proprietary Information or intellectual property) ***arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association***, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof, provided however, that each party will have a right to seek injunctive or other equitable relief in a court of law. . . . Consultant hereby consents to the arbitration in the Commonwealth of Massachusetts in the county of Suffolk.

Id., ¶ 8, Ex. 2 at p. 4, at ¶ 9 (emphasis added). The arbitration provision incorporates the AAA Rules, is binding as to both Plaintiff and Giaran, and provides for arbitration in Massachusetts. *Id.* The Agreement is governed by the laws of Massachusetts. *Id.*, ¶ 8, Ex. 2 at p. 4, at ¶ 8. Plaintiff expressly acknowledged the arbitration provision by signing the Agreement.

B. The Parties' Relationship

1. Defendants Giaran and Fu

Defendant Giaran, a Delaware company, had its headquarters in Boston, Massachusetts, before being acquired by Shiseido Americas Corporation ("Shiseido"). Fu Decl. ¶ 2. Giaran is an instant and interactive virtual makeup robot that provides users a virtual try-on experience of their cosmetics products in-store, online, or on-the-go, with exact color-match and recommendations customized to individual face-shape, skin tone and texture. *Id.*, ¶ 3. It essentially is

a virtual makeover tool. *Id.* Giaran is the brainchild of Defendant Yun "Raymond" Fu, a professor at Northeastern University, based on patented technology he developed over sixteen years of research and development. *Id.*, ¶ 4.

2. Plaintiff Gountoumas

In May 2016, Plaintiff responded to a full-time job posting on the Harvard Business School website for a position as a "Business Development Manager" in Boston, Massachusetts at Giaran. *Id.*, ¶ 5. Plaintiff applied for the position and expressed her passion for the cosmetics, beauty and fashion industries. *Id.* At the time, Plaintiff was living in Los Angeles and had no experience in the cosmetics industry, but acknowledged in her email response to the posting that, "I am aware this position is based in Boston, and am willing to relocate should I be a good fit with your company, but would require a 2-week notice with my current employer." *Id.*, ¶ 6 at Ex. 1.

In the latter part of 2016, and into 2017, Plaintiff volunteered to perform consulting tasks for Giaran to see if she was a good fit for the company. During this time, the parties negotiated the terms of Plaintiff's consulting agreement with Giaran, and her relocation to Boston. *Id.*, ¶ 7. As part of their relationship, Giaran, through Defendant Fu, offered Plaintiff a written stock purchase arrangement, signaling his commitment to her. *Id.*, ¶ 9. The stock purchase agreement offered to Plaintiff related to the consulting work that she agreed to perform for Giaran in Boston. *Id.* The stock purchase agreement required Plaintiff to work for Giaran for one year before any stock vested. *Id.* The parties also memorialized the terms of Plaintiff's consulting agreement in writing, including the mutual arbitration provision. *Id.*, ¶ 8. Despite her promise to move to Boston, on February 6, 2017, Plaintiff refused to relocate, and the parties' relationship deteriorated thereafter. *Id.*, ¶ 10. As of March 2017, the parties were no longer in communication, and their relationship had ended. *Id.*

In November 2017, Shiseido acquired Giaran. *Id.*, ¶ 11. Plaintiff learned of

the acquisition, and despite her refusal to move to Boston as promised or perform any work after March 2017, she now claims that she is owed 15% of the sale of Giaran, and wages as an employee.

C. Plaintiff Filed A Complaint In Violation Of Her Agreement To Arbitrate.

Despite the mutual arbitration provision in the Agreement, on July 24, 2018, Plaintiff filed a Complaint ("Complaint") in the Los Angeles County Superior Court against Giaran and Fu, alleging causes of action for: (1) Declaratory Relief; (2) Breach of Contract; (3) Breach of Implied Covenant of Good Faith and Fair Dealing; (4) Accounting; (5) Breach of Fiduciary Duty; (6) Conversion; (7) Unjust Enrichment, Restitution, and Constructive Trust; (8) Failure to Pay Minimum Wage; (9) Failure to Pay Wages; (10) Failure to Pay Wages Upon Separation; (11) Failure to Reimburse Expenses; (12) Failure to Maintain Required Records; (13) Failure to Allow Inspection of Personnel File; (14) Unfair Business Practices; (15) Violation of the Right of Publicity; (16) Quantum Merit; (17) Fraud and Deceit; and (18) Restitution. Dkt 5-1.

D. Defendants Requested That Plaintiff Stipulate to Arbitration of Her Claims – Plaintiff Refused.

On September 6, 2018, following the filing of Plaintiff's Complaint and removal to federal court, counsel for the parties discussed the arbitration agreement and Defendants' intent to move to compel arbitration based on the arbitration provision in the parties' consulting agreement. Declaration of Charles J. Malaret, ¶ 2. Counsel for Defendants requested that Plaintiff stipulate to arbitration. Defendants' counsel informed Plaintiff's counsel that if Plaintiff would not so stipulate, Defendants intended to move to compel arbitration promptly. *Id.* Plaintiff's counsel advised that Plaintiff would not submit her claims to arbitration. *Id.* ¶ 3. On October 10, 2018, in furtherance of the parties' meet and confer efforts, Defendants' counsel reached out to Plaintiff's counsel and provided a draft of the

motion to compel arbitration Defendants intended to file if Plaintiff would not stipulate to arbitrating her claims. Defendants' counsel requested that Plaintiff's counsel further discuss the subject of arbitration. *Id.* ¶ 4. On October 11, 2018, Plaintiff's counsel responded to Defendants' counsel's meet and confer efforts stating that Plaintiff did not believe Plaintiff's claims were subject to arbitration for the reasons previously discussed and laying out those reasons. *Id.* ¶ 5. On October 12, counsel for the parties emailed further.

As of the date of this Motion, Plaintiff has refused to comply with the Agreement's arbitration provision by dismissing her lawsuit and arbitrating her claims. ¶ 6. This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on September 6, 2018 and September 10-11, 2018.

III. LEGAL ARGUMENT

A. Plaintiff's Claims Are Subject to Arbitration Under the Federal Arbitration Act.

As affirmed by the United States Supreme Court in *AT & T Mobility LLC v. Concepcion*, the Federal Arbitration Act ("FAA") declares a liberal policy favoring the enforcement of arbitration policies, stating: "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 563 U.S. 333, 339 (2011) (citing 9 U.S.C. § 2). The FAA is designed "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983); *see also*, *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24-25 (1991). The FAA does not simply place arbitration agreements on equal footing with other contracts; rather, it "*favor[s]* arbitration agreements." *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (emphasis added).

The Supreme Court has held that the term "involving commerce" is interpreted broadly, so that the FAA governs any arbitration agreement that affects commerce in any way. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995).

In this case, the FAA applies to the arbitration provision. Giaran was a Delaware corporation based in Massachusetts. Plaintiff, a California resident, performed services for Defendants. Plaintiff signed the Agreement which contains a valid and enforceable arbitration provision.[2] Plaintiff's Agreement covered, *inter alia*, Plaintiff's services of marketing and developing Giaran's product nationally, including allegedly growing Giaran's business, securing investors in various locations, performing national beauty industry market research for selling Giaran's product, visiting brick and mortar makeup stores, conducting consumer research, and determining the pricing strategy for selling Giaran's product nationally, interstate commerce is necessarily involved. Dkt 5-1, ¶¶ 4, 8, 12-14, 20, 21.

This type of business and business relationship necessarily affects and involves interstate commerce. *Allied-Bruce Terminix Cos.*, 513 U.S. at 282 (agreeing that contract between homeowner in Alabama and multistate termite control company involved interstate commerce and came within the FAA). Plaintiff's contractual relationship with Defendants therefore involved commerce under the meaning of the FAA. Accordingly, the FAA applies and requires arbitration of Plaintiff's claims.

[2] Defendants anticipate that Plaintiff may argue the consulting agreement and arbitration provision contained therein is not enforceable because Giaran did not sign the agreement. That only one party signed does not render a contract unenforceable where the non-signatory seeks to enforce the contract against the signatory. *See, J. A. Jones Const. Co. v. Plumbers & Pipefitters Local 598*, 568 F.2d 1292, 1295 (9th Cir. 1978) ("That (a party) failed to sign the agreement is immaterial for any written contract though signed only by one of the parties binds the other if he accepts it and both act in reliance on it as a valid contract.") (citations omitted); *Haufler v. Zotos*, 446 Mass. 489, 498-99, 845 N.E.2d 322, 331 (2006) ("A written contract, signed by only one party, may be binding and enforceable even without the other party's signature if the other party manifests acceptance."); Cal. Civ. Code § 3388 (generally, a party who did not sign a written contract may seek to enforce the contract against a party who did sign it).

1. The Arbitration Provision Is Valid And Must Be Enforced.

The FAA requires federal district courts to compel the arbitration of all claims subject to an arbitration agreement. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.") (citing 9 U.S.C. §§ 3,4); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1284 (9th Cir. 2009) ("[W]here the contract contains an arbitration clause, there is a presumption of arbitrability.") The party resisting arbitration bears the burden of showing the arbitration agreement is invalid or does not encompass the claims at issue. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

The FAA requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement, consistent with the principle that arbitration is a matter of contract. 9 U.S.C. § 4. In determining whether to compel arbitration, only two "gateway" issues need to be evaluated: (1) whether there exists a valid agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

2. The Arbitration Provision Delegates the Gateway Issues to The Arbitrator.

Before reaching the gateway issues, the Court must first examine the underlying contract to determine whether the parties have agreed to commit the threshold question of arbitrability to the arbitrator. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the

federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."). The Court's review is limited to the face of the arbitration agreement. *See Anderson v. Pitney Bowes, Inc.*, No. C 04-4808 SBA, 2005 WL 1048700, *4 (N.D. Cal., May 4, 2005) (courts "conduct[] a *facial and limited review* of [a] contract" when deciding "whether the parties have in fact clearly and unmistakably agreed to commit the question of arbitrability to the arbitrator"); *accord Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 553 (2004).

a. The AAA Rules Clearly And Unmistakable Delegate The Gateway Questions To The Arbitrator.

Any attempt by Plaintiff to claim that the arbitration provision is invalid or unenforceable is not properly before this Court because the parties agreed that any dispute relating to the existence, scope, or validity of the arbitration provision be reserved for the jurisdiction of the arbitrator. Specifically, the arbitration provision expressly confirms that the Parties agreed to be bound by the AAA Rules. Rule R-7 of the AAA Commercial Rules provides:

> R-7. Jurisdiction
>
> (a) *The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement*.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of

> the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures[3] (emphasis added). Thus, any challenge Plaintiff may attempt to raise as to the validity of the arbitration provision is not properly before this Court but, by agreement, must be raised before the arbitrator.

The United States Supreme Court has held that parties may agree to submit the issue of "arbitrability" to the arbitrator for decision. *See Rent-A-Center, W., Inc.*, 561 U.S. at 68-69 (holding that threshold issue of arbitrability is for the arbitrator to decide where the parties' arbitration agreement provides that the arbitrator has exclusive authority to resolve any dispute over its enforceability); *see also Rodriguez v. Am. Tech., Inc.*, 136 Cal. App. 4th 1110, 1123 (2006) (finding parties agreed to have the arbitrator determine the scope of the arbitration clause where the agreement mandated arbitration in accordance with the American Arbitration Association's rules).

Normally, in deciding whether to compel arbitration, pursuant to the FAA, the trial court is tasked with determining two "gateway" issues: (1) whether there was an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute. *Chiron Corp.*, 207 F.3d at 1130; *Howsam*, 537 U.S. at 83-84. Additionally, the United Supreme Court has stated that the question of arbitrability is for judicial determination "unless the parties clearly and unmistakably provide otherwise." *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986). However, when, as in this case, the parties agreed to submit the question of arbitrability to the arbitrator, a court's inquiry is limited to the issue of whether the party seeking arbitration is making a claim which is, on its face, governed by the

[3] The American Arbitration Association's Commercial Rules are available at https://www.adr.org/sites/default/files/CommercialRules_Web.pdf

contract. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *see Anderson*, 2005 WL 1048700, at *4. By consenting to the jurisdiction of the arbitrator any issues pertaining to the existence, scope or validity of the arbitration provision, the parties have clearly agreed that an arbitrator, not a court, decides these issues. Accordingly, any challenge to the arbitrability of Plaintiff's claims is not properly before this Court because the parties agreed in a binding contract to have such issues resolved by the arbitrator.

Likewise, any contention by Plaintiff that the arbitration provision is unenforceable because of purported unconscionability must also be decided by the arbitrator and not the Court. *See*, *e.g.*, *Anderson*, 2005 WL 1048700, at *2 (concluding "if the parties 'clearly and unmistakably' empowered an arbitrator to determine arbitrability, the Court must compel arbitration of the gateway issues as well"); *Stewart v. Paul, Hastings, Janofsky & Walker, LLP*, 201 F. Supp. 2d 291, 292 (S.D.N.Y 2002) (ruling that the arbitrator has the exclusive jurisdiction to determine unconscionability).

Here, there can be no question that, through the arbitration provision, the parties entered into an agreement to arbitrate the claims raised in this lawsuit. This is all the Court needs to find in order to compel Plaintiff to arbitrate her claims. To the extent that Plaintiff wishes to argue that the arbitration provision is void due to unconscionability or that the arbitration provision does not cover all of her claims, those issues must solely be addressed and resolved by the arbitrator. Accordingly, the Court should compel Plaintiff to arbitrate her claims and dismiss the underlying action pursuant to the arbitration provision.

B. The Gateway Issues Under The FAA Have Been Satisfied.

Alternatively, should the Court decide that issues relating to the existence, scope, or validity of the arbitration provision are not within the exclusive jurisdiction of the arbitrator, Plaintiff's claims should be referred to arbitration in any event because the arbitration provision is valid and enforceable. As explained

above, absent an agreement between parties to have an arbitrator decide all issues regarding arbitrability, the FAA restricts a court's inquiry into compelling arbitration to two threshold questions: (1) whether there is a valid agreement to arbitrate; and (2) whether the agreement covers the dispute. *Chiron Corp.*, 207 F.3d at 1130.

1. A Valid Agreement to Arbitrate Exists.

In order to compel arbitration, the moving party need only prove that an agreement to arbitrate the claims exists by a preponderance of the evidence. *Alvarez v. T-Mobile USA, Inc.*, 822 F. Supp. 2d 1081, 1084 (E.D. Cal. 2011). Mutual promises to arbitrate suffice to establish the requisite consideration. *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002). Defendants have met their burden to show a valid and enforceable agreement. Plaintiff agreed to submit all claims against Defendants arising out of or relating to the parties' Agreement to binding arbitration—by signing the Agreement, Plaintiff agreed to be bound by the arbitration provision. Further, the arbitration provision imposes mutual obligations to arbitrate, thereby establishing the requisite consideration. Fu Decl., ¶ 2, Ex. 2 at ¶ 9. The arbitration provision requires the parties to submit their respective disputes arising out of, or related to, the Agreement to arbitration. *Id.*

2. Plaintiff's Claims Are Covered by The Arbitration Provision.

In determining what claims are subject to arbitration, the threshold inquiry is an analysis of the contractual language. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("Absent some ambiguity in the agreement . . . it is the language of the contract that defines the scope of disputes subject to arbitration."); *see also Mastrobuono v. Shearson Leaman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995).

Here, Plaintiff's claims fall directly within the scope of the arbitration provision. The arbitration provision applies to "any controversy or claim" "arising out of or relating to" the Agreement. This provision is broad enough to cover

Plaintiff's breach of contract and related claims as well as her wage and hour claims because, as pleaded by Plaintiff, the facts underlying these claims relate to and stem from controversies and claims that arose between Plaintiff and Defendants as a result of the Agreement. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("To require arbitration, [the plaintiff]'s factual allegations need only 'touch matters' covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability."). Therefore, Defendants have met their burden to demonstrate a valid and enforceable arbitration agreement, and the Court should grant Defendants' motion to compel arbitration.

C. Massachusetts Law Requires Enforcement Of The Arbitration Provision.

Under Massachusetts law, the arbitration provision governing Plaintiff's claims applies.[4] "[T]here is a strong public policy favoring arbitration in Massachusetts." *Dixon v. Perry & Slesnick, P.C.*, 75 Mass. App. Ct. 271, 278 (2009). Indeed, where a contract contains an arbitration clause, there is a presumption of arbitrability under Massachusetts law and arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. . . . Such a presumption is particularly applicable where the clause is . . . broad." *Drywall Sys., Inc. v. ZVI Constr. Co.*, 435 Mass. 664, 666-67 (2002), citing *Local No. 1710, Int'l Ass'n of Fire Fighters v. Chicopee*, 430 Mass. 417, 421 (1999).

The Massachusetts Arbitration Act "expresses a strong public policy favoring

[4] To the extent the Court determines that the consulting agreement's choice of law provision dictates the application of Massachusetts law, the Massachusetts Arbitration Act ("MPA") also applies here by its plain terms and compels arbitration of Plaintiff's claims. Fu Decl., ¶ 8, Ex. 2 at ¶ 8; *see e.g.*, *Miller v. Cotter*, 448 Mass. 671, 676–77 (2007) (noting that the FAA's language is "remarkably similar to that of the Massachusetts Act" and that both may apply and would be interpreted in the same way, given the substantial similarities between the FAA and the MPA.)

arbitration as an expeditious alternative to litigation for settling commercial disputes." *Home Gas Corp. of Mass., Inc. v. Walter's of Hadley, Inc.*, 403 Mass. 772, 774 (1989) (citations omitted). "The plain language of the Massachusetts Act requires that an arbitration agreement 'shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.' [] These grounds include fraud, duress, or unconscionability." *Miller v. Cotter*, 448 Mass. 671, 679 (2007).

Under Massachusetts law, an arbitration agreement "is a creature of contract" and the court will first look to the language of the arbitration clause to determine whether the parties by contract submitted the dispute to arbitration. *Com. v. Philip Morris Inc.*, 448 Mass. 836, 843 (2007) ("[W]hen considering a broadly worded arbitration clause, there is a presumption that a contract dispute is encompassed by the clause unless it is clear that the dispute is excluded.")

As discussed in Section II.A above, Plaintiff's claims based on the business development and marketing services she performed for Giaran are encompassed by the broad arbitration provision language compelling arbitration of "any controversy or claim" arising out of or relating to the parties' consulting agreement. Fu Decl., ¶ 8, Ex. 2 at ¶9. The language of the arbitration provision thus plainly and unambiguously encompasses the present dispute. See *Massachusetts Mun. Wholesale Elec. Co. v. City of Springfield*, 49 Mass. App. Ct. 108, 111 (2000) ("[i]nterpretation of language in a written contract is a question of law for the court, and if the words are plain and free from ambiguity, they must be construed in accordance with their ordinary and usual sense.") Additionally, there is no evidence of fraud, duress, or unconscionability (including surprise or oppression). The parties negotiated at arms' length and Plaintiff chose to accept the terms of the consulting agreement, negotiating the scope of the consulting agreement's coverage. *See, e.g.*, Fu Decl., ¶ 8, Ex. 2 at Exhibit A.

D. California Law Does Not Alter The Enforceability Of The Arbitration Provision.

While the Agreement provides that it is to be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, Plaintiff may argue that California law applies.

As explained above, the FAA governs the arbitration provision. Thus, this Court need not even consider the requirements set forth by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83 (2000), in evaluating the enforceability of the arbitration provision. In any event, *Armendariz* is preempted by the FAA. In *Concepcion*, the United States Supreme Court overruled as preempted the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), finding that California had run afoul of the central premise that arbitration is a matter of contract, that contracts must be enforced per their terms, and that states cannot erect obstacles to their enforcement by imposing conditions not generally applicable to all contracts. *Concepcion*, 563 U.S. at 346-47. By imposing conditions to the enforcement of arbitration contracts not applicable to all contracts, *Armendariz* is preempted, just as *Discover Bank* was preempted.

Moreover, even assuming *Armendariz* remains good law, it is inapplicable in this case because its application is limited to arbitration agreements entered into in the context of employer-employee relationships. *See Armendariz*, 24 Cal. 4th at 110-11. Paragraph 5 of the Agreement clearly states that Plaintiff's business relationship with Defendants was that of an independent contractor, and not an employer-employee relationship. Consequently, *Armendariz* is inapposite.

Nevertheless, even if *Armendariz* is applicable to contracts pertaining to independent contractors, the arbitration provision is enforceable. *O'Connor v. Uber Technologies, Inc.*, 2018 WL 4568553 at *5 (9th Cir., September 25, 2018).

Both procedural and substantive unconscionability "must . . . be present in

order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." *Armendariz*, 24 Cal. 4th at 114. Plaintiff, as the party asserting the defense of unconscionability, has the burden of proving it. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 972 (1997) ("a party opposing the petition [to compel arbitration] bears the burden of proving by a preponderance of the evidence any fact necessary to its defense"). She cannot meet her burden. First, Plaintiff cannot prove procedural unconscionability. Second, even assuming she could meet her burden to establish *procedural* unconscionability, she cannot meet her burden to establish *substantive* unconscionability because the arbitration provision complies with *Armendariz's* requirements, "including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the cost of arbitration." *Armendariz*, 24 Cal. 4th at 91; *Little v. Auto Steigler, Inc.*, 29 Cal. 4th 1064, 1080-81 (2003).

E. Plaintiff's Lawsuit Should Be Dismissed.

All of the claims raised by Plaintiff in her lawsuit are subject to arbitration. Consequently, dismissal is appropriate. A district court has the discretion to dismiss a proceeding when "the arbitration clause [is] broad enough to bar all of the plaintiff's claims." *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (finding the arbitration clause sufficiently broad because it required Plaintiff to submit all claims to arbitration); *see also Martin Marietta Aluminum, Inc. v. General Electric Company*, 586 F.2d 143, 147-48 (9th Cir. 1978) (affirming summary judgment in defendant's favor based on plaintiff's failure to comply with arbitration obligations); *Maxit Designs, Inc. v. Coville, Inc.*, 2006 WL 2734366, at *5-6 (E.D. Cal. Sept. 25, 2006).

Plaintiff filed this suit rather than pursuing arbitration. After being reminded of her agreement to arbitrate, she still refused to comply with her contractual obligation. Finally, all of the claims she asserts against Defendants are within the

scope of the arbitration provision. Dismissing this action will protect Defendants' contractual rights to have this dispute resolved through arbitration, and it will avoid the large economic burden on the parties and the Court imposed by judicial litigation.

F. In The Alternative, Defendants Seek An Order Staying This Matter During The Pendency Of Arbitration.

Under the FAA, after the court determines that an agreement exists to arbitrate a controversy, it "shall" order the parties to submit their disputes to arbitration. 9 U.S.C. §3. The FAA also provides that, when the court is "satisfied that the issue involved . . . is referable to arbitration . . . [it] shall on the application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." *Id*. Courts interpreting the language of this statute makes clear that the language should be read literally: as long as: "(1) there is an agreement to arbitrate and (2) *at least one of the issues involved in the suit is within the scope of the arbitration agreement*, a stay is to be granted as a matter of course, except in rare cases." *See Nelson v. La. Elec. Rig Serv.*, 2006 WL 5671234, at *8 (C.D. Cal. Feb. 22, 2006) (emphasis in original). Here, at the very least, the Court should enter an order compelling Plaintiff to submit her claims to binding arbitration, and stay the remainder of this action pending completion of that arbitration. *See id; see also Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 567 (N.D. Cal. 1984) (district courts have "authority to stay proceedings in the interest of saving time and effort for itself and litigants"); *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (trial court may properly enter a stay of an action before it, pending resolution of independent proceedings which bear on the case).

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IV. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to compel arbitration on all of Plaintiff's claim and dismiss, or in the alternative, stay Plaintiff's action.

Dated: October 15, 2018

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Charles J. Malaret
Charles J. Malaret
Kathryn T. McGuigan
Emily L. Calmeyer

Attorneys for Defendants, Shiseido Americas Corporation, f/k/a Giaran, Inc.; Raymond Fu